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[NOT TO BE PUBLISHED - SEE LOCAL RULE 14]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1006 September Term, 1992

Progressive Cellular III B-3,
Appellant

v.

Federal Communications Commission,
Appellee

Appeal from an Order of the Federal Communications Commission

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Before: MIKVA, Chief Judge; SILBERMAN AND RANDOLPH, Circuit Judges

JUDGMENT

[Filed Feb. 2, 1993]

This appeal from an order of the Federal Communications Commission (Commission or FCC) was considered on the

record and on the briefs and oral argument of counsel. The Court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. R. 14(c).

Progressive Cellular III B-3 (Progressive) appeals the FCC's decision to dismiss its cellular application because it violated the Commission's rule against cross-ownership, 47 C.F.R. §22.921(b)(1). Progressive contends that although the names of two of its partners were listed as partners in a competing application, such listing was inaccurate under relevant state partnership law, and that even if the listing was accurate, because the violation of the cross-ownership rule was unintentional and due to the wrongful actions of a third party, the Commission's failure to grant a waiver

of its rule was arbitrary, capricious, and not in accordance with law.

We conclude that the FCC did not have a duty to investigate the reasons for the flawed application, or grant a waiver simply because the violation of the rule was unintentional or not the fault of the appellant. This Court has repeatedly upheld the FCC's rigorous enforcement of its "hard-nosed rules," even where enforcement produces a harsh result, so long as there is "explicit notice of all applicable requirements." See Florida Institute of Technology v. FCC, 952 F. 2d 549, 550 (D.C. Cir. 1992). Since Progressive concedes that it had notice of the rule against cross-ownership, it is

ORDERED and ADJUDGED that the Commission's decision be affirmed.

The Clerk is directed to withhold

issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam

For the Court:

/s/ Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1006 September Term, 1992

Progressive Cellular III B-3,
Appellant

v.

Federal Communications Commission
and United States of America
Appellees

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Apr. 7, 1993]

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested

the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1006 September Term, 1992

Progressive Cellular III B-3,
Appellant

v.

Federal Communications Commission
and United States of America
Appellees

Before: Mikva, Chief Judge; Silberman and Randolph, Circuit Judges

ORDER

[Filed Apr. 7, 1993]

Upon consideration of appellant's petition for rehearing, filed March 11, 1993, it is

ORDERED, by the Court, that the

petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

By: /s/
Robert A. Bonner
Deputy Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE
CELLULAR III B-3

File No. 10570-CL-P-599-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A in Market No. 599, Oklahoma 4-Nowata

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1991;
Released: December 5, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration filed by Progressive Cellular III B-3 (Progressive) in the matter of Progressive Cellular III B-3, 6 FCC Rcd 596 (Mob. Serv. Div. 1991)

(Order).[1] For the reasons discussed below, we deny Progressive's petition.

II. BACKGROUND

2. Progressive's application was tentatively selected as the non-wireline winner of a lottery held on August 9, 1989, for the Nowata, Oklahoma rural service area (RSA). Jackson Cellular Partnership (Jackson) filed a petition to deny, alleging that Progressive had violated Section 22.921(b)(1) of the Commission's rules, which prohibits an applicant from having an interest in more than one application for the same RSA. The Mobile Services Division (MSD) determined that Progressive had an ownership interest in Rubana Cellular Co.

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[1]The subject petition for reconsideration has been referred to us by the Chief, Common Carrier Bureau, pursuant to 47 C.F.R. §§ 1.104(B), 1.106(1).

South Central (Rubana), a mutually exclusive applicant for the Nowata RSA. The attributed ownership was by virtue of the membership of two of Progressive's partners, Dennis and Jack Thomas (the Thomases), in Advanced Cellular Company (Advanced), which was reported by Rubana in its Nowata application as one of that applicant's partners. Consequently, the MSD dismissed Progressive's application. Order, supra. Progressive now asks that the MSD's action be reconsidered and its application reinstated.

III. DISCUSSION

3. Progressive, reiterating its arguments before the MSD, states that the inclusion of the Thomases in Rubana's application was without their knowledge or consent, and that Advanced's managing partner, Milton E. Vaughn (Vaughn),

exceeded the scope of his authority when he included them. Such authority, it adds, was subsequently disavowed.

4. Progressive submits that the MSD's decision stems from an imprecise and misdirected application of partnership law and the absence of proper analysis of the underlying facts. It points out that the stated rationale for dismissal of its application was that the actions of one partner bind all other partners in the partnership. While Progressive says it generally agrees that the contracts of a partner made within the general scope of the business of the partnership are binding and require no ratification by the partnership, this principle only applies to persons who have unwittingly relied on the apparent authority of the errant partner. In the instant matter, says

Progressive, it demonstrated that the scope of Advanced's partnership agreement was limited to non-wireline metropolitan statistical area (MSA) cellular lotteries, not RSA lotteries. Moreover, says Progressive, Vaughn had no authority to bind Advanced absent a vote of its partners, and Rubana, whose managing partner is also Vaughn, was fully aware of the limitations placed on Vaughn's authority. Consequently, Progressive claims, the MSD's action ignored determinative facts and misapplied basic partnership law.

5. The language of Section 22.921 of the rules is unequivocal in its prohibition against any party holding any interest in two applications for the same

RSA market.[2] The Commission offered no exemption for parties who are unwittingly bound by their partners, or for parties who interests are "unknowingly colorably in technical violation of Rule 22.921." See Pet. for Recon. at p. iii. As the MSD correctly stated, because the Thomases were partners in Advanced, and Advanced was a partner in Rubana, Advanced's actions bound the Thomases through the Rubana filing.[3] Any claim the Thomases may have that Vaughn violated his

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[2]Section 22.921(b)(1) provides, in pertinent part:

For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent.

[3]The Thomases' retroactive withdrawal from Advanced cannot cure the defect in the application as filed. See Progressive Cellular III B-2, 5 FCC Rcd 2772 (1990).

delegated authority under this partnership agreement is more properly resolved in a judicial forum. See, e.g., Sonderling Broadcasting Co., 46 Rad. Reg. 2nd (P&F) 890 (1979); John R. Kingsbery, 71 FCC 2nd 1173 (1979); Rodney A. McDaniel, 4 FCC Rcd 1736 (Comm. Car. Bur. 19890.

6. To the extent Progressive is implicitly requesting waiver of Section 22.921, the record does not support its assertion that Advanced was barred from entering lotteries for the RSA markets. The purported restriction against participation in RSA lotteries is not contained in Advanced's partnership agreement provided to the MSD. See Pet. for Recon., Exhibit 1. Nor can such a restriction reasonably be inferred from the conduct of the partnership's members. The record indicates that Vaughn formed

Rubana for the purpose of applying for RSA cellular authorizations, but he first obtained the consent of most of the Advanced partners. While Vaughn was unable to locate the Thomases, none of the other Advanced partners voiced any concern that his proposal exceeded the partnership's mandate or that he was acting beyond the scope of this authority.

7. Similarly, the record also does not support Progressive's other assertion that Vaughn acted beyond the scope of his authority when he caused Advanced to become a partner of Rubana. Advanced's partnership agreement explicitly authorizes the managing partner to carry out the partnership's business of procuring licenses to operate cellular telephone facilities. Moreover, the managing partner's exercise of his

authority does not require the unanimous consent of the remaining partners, as claimed by Progressive. What the partnership agreement does provide is that once the managing partner procures a license his function as license procurement agent ceases, and the partnership as a whole will decide how and what business decisions are to be made in order to construct and operate the facilities that will utilize the newly acquired license. Meanwhile, the managing partner would continue coordinating the partnership's original business of procuring cellular telephone licenses. Id. at paras. 3 and 12. Consequently, the record demonstrates that Vaughn properly fulfilled his duties as managing partner of Advanced, namely, binding his partners to RSA applications. Accordingly, based

on the record before us, we decline to grant a waiver. See 47 C.F.R. § 22.19.

IV. CONCLUSION

8. We cannot find that the MSD erred in its findings, or that it failed to interpret or apply any "determinative" facts or partnership law incorrectly. The MSD's decision to return both Progressive and Rubana's applications for violation of Section 22.921 was consistent with Commission rules and policy. In sum, we affirm the MDS's action taken in the Order.

V. ORDERING PARAGRAPH

9. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Progressive Cellular III B-3 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy

Secretary

Code of Alabama - Excerpts

Alabama Partnership Act

(1971 Ala. Acts, No. 1513, p. 2609)

§10-8-49. Partners as agents of partnership.

(a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partners, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(b) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by all the partners.

(c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to do any act that would make impossible the continuance of the ordinary business of the partnership, including the disposition of the whole of the partnership property at once, assignment of the partnership property for benefit of creditors or disposition of the goodwill of the business.

(d) No act of a partner in contravention of a restriction on authority shall bind the partnership to

persons having knowledge of the restriction.